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Supreme Court, U.S.
FILED
AUG 25 2006
OFFICE OF THE CLERK

No. 05-1126

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,
Petitioners,

v.

WILLIAM TWOMBLY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CTIA – THE WIRELESS ASSOCIATION, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, NORTHWEST AIRLINES, INC., UNITED AIR LINES, INC., AND WEYERHAEUSER COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

MICHAEL FIELD ALTSCHUL
CTIA – The Wireless Association
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
MATTHEW R. SEGAL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

JOHN T. WHATLEY
Alliance of Automobile Manufacturers
1401 H Street, N.W., Suite 900
Washington, D.C. 20005
(202) 326-5500

* *Counsel of Record*

(additional counsel listed on inside cover)

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3000

PETER B. KENNEY, JR.
Northwest Airlines, Inc.
Department A1180
2700 Loan Oak Parkway
Eagan, MN 55121-1534
(612) 726-3663

MARK S. POPOFSKY
Kaye Scholer LLP
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500
Counsel for Pharmaceutical Research and Manufacturers of America

KEN KHOURY
GUY STEPHENSON
KATHRYN FEWELL
Weyerhaeuser Company
CH 1 J 28
33663 Weyerhaeuser Way
Federal Way, WA 98003
(253) 924-5091

RICKS P. FRAZIER
United Air Lines, Inc.
1200 E. Algonquin Rd.
Elk Grove Township, IL 60007
(847) 700-4446

SAUL P. MORGENSTERN
ROBERT GRASS
SHEFALI M. KOTHARI
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000
Counsel for Pharmaceutical Research and Manufacturers of America

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of the issues presented in this case to companies collectively responsible for a substantial portion of total U.S. economic activity. The Chamber is concerned not only that the decision below sets a pleading standard for antitrust litigation that is inconsistent with both substantive antitrust law and general pleading law, but also that it does so in a context – a massive consumer class action complaint – that unleashes the most abusive kind of litigation, often brought to coerce settlement of weak cases rather than with any real prospect of success on the merits.

CTIA – The Wireless Association represents all segments of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has filed *amicus* briefs in this Court and other federal courts on a variety of issues of interest to the wireless industry in such disparate cases as *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001), and

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[1] The parties' blanket consents to the filing of amicus briefs have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113 (2005). Many of CTIA's members provide service directly to consumers, and CTIA is concerned that the decision below might allow massive consumer class actions to proceed without any real factual basis.

The Alliance of Automobile Manufacturers is a trade association composed of nine car and light truck manufacturers. The Alliance is the leading advocacy group for the automobile industry on a range of public policy issues. The Alliance has long been concerned about abusive antitrust litigation, including vexatious class actions.

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's members, many of which are based in the Second Circuit, compete in an intellectual-property-driven industry characterized by (i) pervasive federal regulation that applies uniformly to all members, (ii) gatekeepers (doctors and formulary designers) who determine whether and how prescription pharmaceutical products will be used, and (iii) increasingly sophisticated third-party payors who impose similar requirements on all competitors that wish to provide prescription pharmaceuticals to their beneficiary populations. Because they face numerous similar regulatory and market forces, PhRMA's members are often likely to engage in competitive, yet parallel, conduct that the antitrust laws do not prohibit. The Second Circuit's ruling threatens to chill that legitimate business conduct, impose harm on PhRMA's members, and harm American consumers.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about

the vital role of manufacturing to America's economic future and living standards. The NAM is concerned that the decision below will thwart healthy competition and impede the economic growth that the NAM seeks to promote.

Northwest Airlines and United Air Lines are two of the world's five largest airlines. Each has been providing passenger service continuously since the 1920s. Northwest and United operate in an industry in which sustained profitability has been extremely elusive. Yet the forces of competition often leave particular routes served only by one or two carriers, and rational business decisionmaking in this industry necessarily depends on assessments of – but not agreement on – other carriers' likely responses. The resulting high "market shares" and appearances of interdependent carrier behavior may make airlines attractive targets for spurious antitrust litigation. If the pleading threshold is as low as the Second Circuit has indicated in the decision below, Northwest and United are concerned that they may be subjected to meritless antitrust litigation, including class actions, brought by counsel in possession of observations of lawful "parallel" conduct by airlines but no facts at all to suggest an actual antitrust violation.

Weyerhaeuser Company was incorporated in 1900 and is one of the world's largest integrated forest products companies. It has offices or operations in 18 countries, with customers worldwide. Weyerhaeuser is principally engaged in the growing and harvesting of timber; the manufacture, distribution, and sale of forest products; and real estate construction, development and related activities. Forest product companies operate in a competitive, tight market place where independent parallelism is a necessary fact of life. A pleading threshold as low as that advanced by the Second Circuit will involve the forest product industry in a myriad of expensive litigation based on market conditions rather than facts constituting a conspiracy.

STATEMENT

If a plaintiff must prove certain facts to be entitled to relief, then it must allege those facts to state a valid claim. By disregarding that basic rule, the Second Circuit has permitted an enormous yet inevitably futile case to proceed. Indeed, the very first sentence of the district court's opinion gives a hint of just how remarkable the present litigation is: "Plaintiffs William Twombly and Lawrence Marcus bring this putative class action on behalf of themselves and *all other individuals who purchased local telephone or high speed internet services in the continental United States between February 8, 1996, and the present*." Pet. App. 35a (emphasis added). In fact, the case is even more gargantuan: "This lawsuit is brought as a class action on behalf of all individuals *and entities* who purchased local telephone and/or high speed internet services * * *." JA 10 (Am. Compl. ¶ 1, emphasis added). Essentially, this is a lawsuit on behalf of virtually every business in the continental United States and every human being who has set foot in the continental United States over a multi-year period. Even more remarkably, this case is one in which the core allegation is that, but for a vaguely pleaded "conspiracy," the structure of an entire industry would have been different, with each defendant entering markets it has chosen not to enter and competing more "meaningfully" in the markets of its competitors. See *id.* at 27 (Am. Compl. ¶ 51).

Plaintiffs originally filed a complaint under Section 2 of the Sherman Act, alleging that defendants engaged in illegal monopolization. Plaintiffs abandoned their monopolization claim when it became clear that it could not succeed, then turned to a different court where they added a conclusory allegation of "conspiracy," alleged "upon information and belief." Lacking any evidence of conspiracy, plaintiffs argued that an agreement should be inferred from defendants' parallel conduct. This time around, the plaintiffs argued that defendants' conduct – the same conduct plaintiffs previously described as a profitable and anticompetitive course of unilateral behavior – would not make

sense in the absence of a conspiracy. See Pet. 4-5; JA 27 (Am. Compl. ¶ 51).

The district court acknowledged that "[a]ll reasonable inferences are to be drawn in the plaintiffs' favor," Pet. App. 40a, but believed itself at liberty to examine the complaint through the lens of substantive antitrust doctrine and to dismiss the complaint because it alleged only lawful parallel conduct, with a conclusory "conspiracy" allegation tacked on. The allegations of parallel conduct, even if true, could not support any inference that defendants had entered into an illegal agreement. The court of appeals, by contrast, reversed "[b]ecause we disagree with the standard that the district court applied in reviewing the sufficiency of the plaintiffs' allegations." Pet. App. 3a. Although parallel conduct is lawful, and additional facts must therefore be proved to permit an inference that otherwise-lawful parallel conduct was the product of an unlawful conspiracy, the court concluded that alleging such additional facts was unnecessary at the pleading stage. Pet. App. 25a (facts alleged are sufficient as long as they do not rule out conspiracy as a "'plausible' possibility"). The court was prepared to let the antitrust complaint in this case go forward on the theory that "a pleading of facts indicating parallel conduct by the defendants" – *i.e.*, pleading *only* lawful behavior – "can suffice to state a plausible claim of conspiracy." *Ibid.*

The court of appeals criticized district court decisions (including the one it was reversing) that have looked to "facts beyond 'conscious parallelism'" at the pleading stage as "elid[ing] the distinction between the standard applicable to Rule 12(b)(6) and Rule 56 motions on the basis of a well-founded concern that to do so otherwise would be to condemn defendants to potentially limitless 'fishing expeditions' – discovery pursued just 'in case anything turn[s] up' – in hopes, perhaps, of a favorable settlement in any event." Pet. App. 27a (footnotes omitted). Although the point of those decisions is simply that a complaint alleging only *lawful* conduct should be dismissed, the court of appeals viewed them as imposing an

impermissible "heightened pleading requirement." *Id.* at 28a. The court was "not unsympathetic" to concerns about vexatious litigation (*ibid.*; see also *id.* at 30a) but thought such concerns irrelevant under this Court's precedents.

SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 8(f) commands that "all pleadings shall be so construed as to do substantial justice." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957), relied on that instruction and added that pleading should not be treated as a "game of skill" but that instead "[t]he purpose of pleading is to facilitate a proper decision on the merits." Here plaintiffs – not defendants – are treating pleading as a game of skill, in which they can impose great cost on defendants through artful pleading in which the alleged "fact" of a conspiracy is in reality an inference that lacks any real support from the facts that have been alleged.

Although courts must assume the truth of factual allegations when they rule on a motion to dismiss, they can and should independently evaluate – under the controlling principles of *law* – the reasoning that underlies inferences and legal conclusions. They need not accept legally impermissible inferences that plaintiffs seek to draw from the facts that they have alleged.

Courts should look to the substantive law that governs a claim to decide which inferences are permissible. Antitrust law makes clear that an anticompetitive conspiracy may *not* be inferred merely from parallel conduct. Something more than parallel conduct must be shown to prove a conspiracy. Because concerted action is an essential element of any claim under Section 1 of the Sherman Act, and because a conspiracy cannot be inferred from parallel conduct alone, something more than parallel conduct – *i.e.*, facts "showing that the pleader is entitled to relief" (Fed. R. Civ. P. 8(a)) – must be alleged to state a claim upon which relief can be granted.

Courts should not deny a motion to dismiss because there *might be* facts that would support a claim, when the plaintiffs

have not alleged such facts. This Court held in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), and reaffirmed in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), that, if plaintiffs must prove certain facts to prevail on the merits, they must allege those facts to state a valid claim. That principle is in accord with Rule 11 of the Federal Rules of Civil Procedure. The Second Circuit's decision, that a complaint is sufficient if there might be unpleaded facts that would support liability, relieves plaintiffs of their obligation to certify allegations of essential elements of their claims.

The Second Circuit was also wrong when it concluded that it was powerless to consider the practical consequences of its ruling – *i.e.*, that its decision would permit virtually any complaint alleging parallel conduct to survive a motion to dismiss; that such complaints could impose colossal expense on defendants and subject them to blackmail settlements; that such results would encourage still more abusive cases; and that the result would adversely affect businesses that had done no wrong. Rule 8(f) requires pleadings to be construed "to do substantial justice," and this Court has more than once acknowledged that the risk of vexatious litigation is a relevant factor that should be considered when a court rules on a motion to dismiss.

It is entirely appropriate to consider the risk that lawyer-driven class actions, like this case, systematically lead to what Judge Friendly, borrowing terminology from antitrust scholar Milton Handler, called "blackmail settlements." Because of the risk that massive class actions will be filed solely to pressure defendants to settle rather than endure enormous discovery costs, even though the claims have no merit, it is proper for courts to scrutinize such cases more carefully than cases that do not entail such risks.

Similarly, the Second Circuit should not have deemed irrelevant to its decision the fact that it would permit plaintiffs to impose large discovery costs merely by alleging parallel business behavior that is endemic in the economy, that is almost

always desirable, and that rarely suggests anticompetitive collusion. Parallel conduct may be especially common in regulated industries, because pervasive, uniformly applied regulations and regulators' directives make similar reactions by firms to similar market forces inevitable. The costs of permitting vexatious litigation challenging such innocuous yet parallel conduct to proceed could be crippling.

The federal rules do *not* require courts to look at a massive lawsuit that threatens enormous discovery costs, and that is filed by sophisticated class-action lawyers on the flimsiest of evidence, through the same lens with which they would examine a different kind of case. And, especially in a case such as this one, the rules do not require courts to assume that there might be facts that were *not* alleged that would support a claim, when the facts that the plaintiffs *have* alleged are plainly inadequate to do so.

ARGUMENT

In *Conley* v. *Gibson*, 355 U.S. 41 (1957), the Court did not set down principles that favor plaintiffs in every case. Rather, it "[f]ollow[ed] the simple guide of [Federal] Rule [of Civil Procedure] 8(f) that 'all pleadings shall be so construed as to do substantial justice.'" 355 U.S. at 48. The Court further decried the notion that "pleading is a game of skill." *Ibid.* "[T]he purpose of pleading is to facilitate a proper decision on the merits." *Ibid.*

Under those three principles, as enshrined in the federal rules, plaintiffs are not required to allege *every* fact that might support their claims, before they have had any opportunity to take discovery. But they must allege *enough* facts to show that they will have a legally valid claim, if they can eventually prove their allegations. See Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief * * * shall contain * * * a short and plain statement of the claim showing that the pleader is entitled to relief * * *."). Plaintiffs cannot subject defendants to the costs of discovery and litigation unless there is *sufficient* reason

to believe that the factual allegations are true; such allegations must "have evidentiary support or, if specifically so identified, [be] *likely* to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3) (emphasis added). Courts must assume the truth of plaintiffs' factual allegations when ruling on a motion to dismiss. But courts need not and should not automatically assume the validity of inferences, deductions, and legal conclusions that plaintiffs seek to draw from those alleged facts. When applying these principles, courts are required to apply substantive legal doctrine to the allegations of the complaint, and are permitted to consider practical realities.

Yet the Second Circuit here did just the opposite, treating a substantive antitrust principle as if it had no applicability until the summary-judgment stage, and recognizing many practical realities that counseled in favor of dismissal but declaring it illegitimate to base a decision on those realities. Those errors should be reversed.

I. Conclusory Allegations Of Conspiracy Are Insufficient To State A Claim

When a complaint reveals fatal flaws in the plaintiffs' theory of the case, doing substantial justice requires dismissing the complaint, not trying to imagine some hypothetical way for the fatal flaws to be overcome. *E.g.*, *Associated Gen. Contractors*, 459 U.S. at 526. In this case, plaintiffs' claim under Section 1 of the Sherman Act depends on proving something that their amended complaint does not directly allege, namely, facts evidencing a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." Pet. App. 3a (quoting 15 U.S.C. § 1). The Second Circuit observed that "the amended complaint does not identify specific instances of conspiratorial conduct or communications." Pet. App. 31a. Rather, as plaintiffs acknowledged in opposing the petition, their conspiracy claim rests not on direct evidence but on the inference they would like the Court to draw that there are

"strong grounds for believing a horizontal conspiracy *may exist* among the Defendants." Br. in Opp. 21 (emphasis added).[2]

To support that desired inference, the amended complaint reasons that the defendants' parallel conduct "would be anomalous in the absence of an agreement * * * not to compete." JA 21 (Am. Compl. ¶ 40). That allegation, of course, is squarely inconsistent with the theory of the plaintiffs' earlier complaint alleging a violation of Section 2 of the Sherman Act, *i.e.*, that the same conduct (without the "conspiracy" conclusorily alleged in the later Section 1 complaint) was supposedly profitable as a *unilateral* act of monopolization.

The district court's carefully reasoned opinion explained why the *facts* alleged by the plaintiffs could not, under applicable antitrust law, support the *inference* that defendants had entered into a conspiracy not to compete against one another. The Second Circuit reversed, not because it concluded that a conspiracy was likely if the factual allegations were true, but because it could not conclude that a conspiracy was wholly implausible. Pet. App. 25a. It treated the allegation of conspiracy as a factual allegation that must be assumed to be true, unless the other allegations in the complaint indicated that conspiracy was a virtual impossibility – a standard that would permit "'*any* claim asserting parallel conduct [to] survive a motion to dismiss.'" *Id.* at 28a (quoting Appellees' Br. at 29) (emphasis altered). That is not a correct understanding of the law of pleading. Whether an inference is a permissible one is a question for a court applying law to pleaded facts.

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[2] "Though this case involves a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)," plaintiffs' briefing "may [be] use[d] * * * to clarify allegations in [their] complaint." *Pegram* v. *Herdrich*, 530 U.S. 211, 230 n.10 (2000).

A. Courts Are Not Required To Adopt Inferences And Legal Conclusions That Are Pleaded In A Complaint

The Federal Rules of Civil Procedure and this Court's precedents do not require blind credulity when it comes to inferences and legal conclusions pleaded in a complaint. At the motion-to-dismiss stage, *factual* allegations must of course be accepted as true. See *Zinermon* v. *Burch*, 494 U.S. 113, 118 (1990); *Kugler* v. *Helfant*, 421 U.S. 117, 125 n.5 (1975).[3] But "there are other types of allegations that need not be accepted as true on a Rule 12(b)(6) motion." 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 521 (3d ed. 2004). "Among these are that the district court is not bound by a pleading's * * * 'unwarranted inferences,' or its 'unwarranted deductions.'" *Id.* § 1357, at 521-539 (footnotes omitted). And courts are not bound by "a legal conclusion couched as a factual allegation." *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986).

Courts must assume the truth of factual allegations but need not accept mere inferences because, whereas courts are not well situated to evaluate factual assertions at the pleadings stage, they are institutionally equipped to evaluate the legal reasoning plaintiffs apply to those claims. See *Associated Gen. Contractors*, 459 U.S. at 526; *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler*, 303 U.S. 54, 57 (1938) ("The motion admits as facts allegations describing the manner in which the business is carried on, but not legal conclusions from those facts."). Even at the motion-to-dismiss stage, courts are authorized "to dismiss a claim on the basis of a dispositive issue of law." *Neitzke* v. *Williams*, 490 U.S. 319, 326 (1989). Thus, although a court must defer to factual allegations at the motion-to-dismiss stage, "if the allegations of the complaint fail to

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[3] See also *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (material facts must be accepted as true); *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (same).

establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent" not fulfillment, but "abdication," of "judicial responsibility." *Havoco of Am., Ltd.* v. *Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980).[4]

Here, plaintiffs openly acknowledge that their claim rests on "an inference of conspiracy." Pet. Opp. 24. That inference is merely an "'opprobrious epithet[],'" worthy of only as much deference as this Court's precedents will allow. *Chongris* v. *Bd. of Appeals*, 811 F.2d 36, 37 (1st Cir. 1987) (quoting *Snowden* v. *Hughes*, 321 U.S. 1, 10 (1944)).

B. Substantive Antitrust Law Limits The Range Of Permissible Inferences That May Be Drawn From Parallel Behavior

The *judicial* responsibility to decide what inferences, deductions, and legal conclusions may be drawn from the

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[4] Accord, *e.g.*, *Farm Credit Servs. of Am.* v. *Am. State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) ("[W]e are 'free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.'" (quoting *Wiles* v. *Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002))); *Doug Grant, Inc.* v. *Greate Bay Casino Corp.*, 232 F.3d 173, 183-184 (2000) ("[W]hile our standard of review requires us to accept as true all factual allegations in the complaint, we need not accept as true unsupported conclusions and unwarranted inferences.") (internal quotation marks omitted); *E. Shore Markets, Inc.* v. *J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000) ("[W]e need not accept as true unwarranted inferences, unreasonable conclusions, or arguments."); *Claybrook* v. *Birchwell*, 199 F.3d 350, 353 n.1 (6th Cir. 2000) ("A court is not bound to accept alleged legal conclusions or unwarranted factual inferences."); *Halkin* v. *VeriFone, Inc.* (*In re VeriFone Secs. Litig.*), 11 F.3d 865, 868 (9th Cir. 1993) ("Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim."); *Chahal* v. *Paine Webber Inc.*, 725 F.2d 20, 23 (2d Cir. 1984) ("[W]hen a complaint fails to state facts as distinguished from conclusions or vague general allegations we have not hesitated to uphold its dismissal.").

plaintiff's factual allegations should be controlled by the substantive law that governs the asserted claim. *E.g.*, *Associated Gen. Contractors*, 459 U.S. at 526. Even at the motion-to-dismiss stage, this Court has never shied away from a searching application of substantive antitrust principles to the plaintiffs' theory of the case.[5] Such an application is not, as the court of appeals mistakenly believed, applying a "heightened pleading standard." Rather, it is recognizing that the distinctions made important by substantive antitrust law should be observed at *every* stage of the litigation. To recognize those distinctions is doing nothing more than "facilitat[ing] a proper decision on the merits," as *Conley* commands. 355 U.S. at 48.

This Court's antitrust decisions make it clear that a conspiracy could not properly be inferred from respondents' factual allegations of parallel conduct. Those allegations, even if true, would not permit a factfinder applying antitrust law to infer the existence of an anticompetitive agreement. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Rather, a plaintiff's burden is to "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Ibid.* (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). In addition to parallel conduct, plaintiffs must allege *facts* tending to show that the parallel conduct was not as innocent as it appears on its face. These facts can take many forms and will

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[5] See, *e.g.*, *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (reversing Second Circuit decision that had reversed grant of motion to dismiss antitrust case: "The question before us today is whether the allegations of respondent's complaint fit within existing exceptions [to the general principle that a firm need not help its rivals] or provide a basis, under traditional antitrust principles, for recognizing a new one."); *id.* at 414 ("Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs.").

include, at a minimum, facts courts have labeled as "plus factors." *E.g.*, Pet. App. 42a; *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (defining "plus factors" as "*necessary* conditions for the conspiracy inference") (emphasis added).

Although *Matsushita* was this Court's most recent effort to grapple with the problems stemming from the prevalence of "parallel" business behavior, it was by no means the first. More than 50 years ago, this Court addressed the issue in an opinion by Justice Tom C. Clark, who had previously been the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. In *Theatre Enterprises, Inc.* v. *Paramount Film Distribution Corp.*, 346 U.S. 537 (1954), the Court declared emphatically that agreement may *not* be inferred from parallel behavior alone. "Seemingly with some exasperation, the *Theatre Enterprises* opinion declared that 'circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.'" 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1412b, at 70 (2d ed. 2003) (quoting *Theatre Enters.*, 346 U.S. at 541).

Just a few years after this Court decided *Theatre Enterprises*, a leading antitrust commentator wrote: "The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962). Substantive antitrust law – not a doctrine of civil procedure applicable only at the summary-judgment stage – makes it critical that a plaintiff wishing to pursue conspiracy allegations identify relevant facts beyond "[m]ere parallelism," which "is not itself a compelling subject for legal control." 6 AREEDA & HOVENKAMP, *supra*, ¶ 1417g, at 115.

Matsushita and *Theatre Enterprises* cannot be cabined to summary-judgment determinations, as the Second Circuit believed. See Pet. App. 24a-25a. It is not some peculiar feature of the summary-judgment standard, but rather "antitrust law," that "limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. Because the purpose of looking beyond mere parallelism to facts "showing that the pleader is entitled to relief" (Fed. R. Civ. P. 8(a)) is to separate lawful from unlawful conduct, such facts must be alleged in order to "state a claim upon which relief can be granted" (Fed. R. Civ. P. 12(b)(6)).

C. Courts Should Not Assume That Plaintiffs Can Prove Facts They Have Not Alleged, Or Excuse Plaintiffs From Their Obligation Under Rule 11 To Certify Allegations Of Facts Essential To Their Claims

The need for courts to distinguish between factual allegations, on the one hand, and the inferences and legal conclusions that plaintiffs seek to draw from those allegations, on the other, is reinforced by two additional considerations. First, the concept of notice pleading does not authorize a court "to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors*, 459 U.S. at 526; see also *Tatum* v. *State of Iowa*, 822 F.2d 808, 810 (8th Cir. 1987) ("To state a claim sufficient to withstand a motion to dismiss, a plaintiff must state facts which, if proved, would support his claim and entitle him to relief."). The Court reaffirmed that principle recently in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005). Applying Federal Rule of Civil Procedure 8, the Court explained that plaintiffs' allegations that they were "'damaged'" by "'pa[ying] artificially inflated prices'" for securities was insufficient as a matter of law to establish proximate causation because that allegation, even if proven, "is not itself a relevant economic loss" and "the complaint nowhere else provides the defendants with notice

* * * of what the causal connection might be between that loss and the [alleged] misrepresentation." *Id.* at 347. The Court acknowledged that "an initially inflated purchase price *might* mean a later loss." *Id.* at 342 (emphasis in original). But unlike the Second Circuit in this case, which required the defendants to show that there was "no set of [unpleaded] facts that would permit [the] plaintiff to demonstrate" a valid claim (Pet. App. 25a), this Court in *Dura* (and in *Associated General Contractors*) placed the burden of alleging essential facts precisely where it belongs – on the party seeking to initiate litigation.

The leading antitrust treatise, citing *Associated General Contractors*, explains that "a complaint may be dismissed when it fails to allege some fact that is essential to the cause of action * * * [F]ailure to allege a fact essential to the claim is tantamount to an admission that that fact cannot or will not be established." 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 307(c)(1), at 71 (2d ed. 2000). That observation applies with special force to conclusory allegations of antitrust conspiracies because "terms like 'conspiracy,' or even 'agreement,' are border-line," in that they risk masking a complaint's failure to allege actual facts supporting its legal claims. *DM Research, Inc.* v. *Coll. of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (Boudin, J.). Consequently, courts of appeals have for decades relied on the principle that:

> [a] general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action * * *[;] plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment.

Fuentes v. *S. Hills Cardiology*, 946 F.2d 196, 201-202 (3d Cir. 1991) (quoting *Black & Yates* v. *Mahogany Ass'n*, 129 F.2d 227, 231 (3d Cir.), cert. denied, 317 U.S. 672 (1942)).[6]

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[6] See also *TV Commc'ns Network, Inc.* v. *Turner Network Television,*

The holdings of *Dura* and *Associated General Contractors* – that, if a plaintiff must prove particular facts in order to prevail on the merits, the plaintiff must allege those facts to survive a motion to dismiss – fit hand in glove with the requirements of Rule 11. That rule requires that allegations and other factual contentions have or be likely to have evidentiary support. The essence of that requirement is that "signing denotes merit." *Bus. Guides, Inc.* v. *Chromatic Commc'ns Enters.*, 498 U.S. 533, 546 (1991). But the substance of that requirement would be largely eliminated if plaintiffs were excused from any requirement to allege facts that are essential to a meritorious claim. Even if conspiracy could be one *possible* explanation for the parallel conduct alleged in this case (as, presumably, it could be in *any* case of parallel conduct), in the absence of direct evidence other facts are needed before conspiracy can be regarded as a *likely* explanation. To support the essential element of their claim, plaintiffs should be required to allege facts that "'tend[] to exclude the possibility that the alleged conspirators acted independently.'" *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764). A rule that shifts the burden to the defendant to demonstrate that there is "no set of facts" (Pet. App. 25a) that could support liability – whether or not the plaintiff has alleged those facts – and that draws "all inferences in favor of the plaintiffs" (*id.* at 30a) instead of only *legally reasonable* inferences, vitiates the protections of Rule 11.

Inc., 964 F.2d 1022, 1026 (10th Cir. 1992) ("'[A] bare bones [accusation] of conspiracy * * * without any supporting facts' is insufficient to state an antitrust claim." (quoting *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1388 (10th Cir. 1980))); 54 AM. JUR. 2d *Monopolies and Restraints of Trade* § 484 ("In a civil action alleging a conspiracy in violation of Section 1 of the Sherman Act, a general allegation of conspiracy is merely a legal conclusion and is insufficient to state a cause of action." (citing *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir. 1953))) (footnote omitted).

II. Rule 8 Authorizes Courts To Consider The Risk Of Abusive Litigation, Enormous Discovery Costs, And Substantive Legal Doctrine When Construing Pleadings "To Do Substantial Justice"

The Second Circuit also erred when it acknowledged, but refused to give effect to, the rationale of *Conley*. There, this Court "[f]ollow[ed] the simple guide of [Federal] Rule [of Civil Procedure] 8(f) that 'all pleadings shall be so construed as to do substantial justice.'" 355 U.S. at 48. The Court further decried the notion that "pleading is a game of skill." *Ibid.* "[T]he purpose of pleading is to facilitate a proper decision on the merits." *Ibid.*

The Second Circuit failed to comprehend the proper application of each of those principles. It recognized that its decision would permit virtually any allegation of lawful parallel conduct to survive a motion to dismiss (Pet. App. 28a); that it could permit plaintiffs asserting meritless claims to exact "colossal expense" and blackmail settlements (*id.* at 30a); that "the success of such meritless claims [in coercing settlements] encourages others to be brought" (*ibid.*); and that the result could be "potentially limitless 'fishing expeditions'" (Pet. App. 27a) and "a deleterious effect on the manner in which and efficiency with which business is conducted" (*id.* at 30a). Despite all that, the Second Circuit reversed.

But Rule 8(f), which requires that "[a]ll pleadings shall be so construed as to do substantial justice," is not empty verbiage. Rather, Rule 8(f)'s substantial justice requirement is "inextricably linked to Rule 8(a)'s simplified notice pleading standard." *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 513 (2002). Similarly, "[w]ise judicial discretion is needed to assure that the mandate of Rule 1, which calls for the 'just, speedy, and inexpensive determination of every action,' is applied to effectuate the philosophy underlying the pleading standard." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1218, at 273 (3d ed. 2004). To achieve "substantial justice," courts must pay attention to context.

Consequently, "the appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case before the court." 5 WRIGHT & MILLER, *supra*, § 1218, at 273; see also *United States* v. *AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992) ("Although the legal standard for reviewing a motion under Rule 12(b)(6) remains constant, the degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context."). For example, it is "settled law" that complaints drafted by *pro se* plaintiffs, "'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers." *Hughes* v. *Rowe*, 449 U.S. 5, 9 (1980) (quoting *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972)). Similarly, courts often review a plaintiff's amended complaint with greater rigor than the original complaint.[7] In each context, the proper approach to the pleadings ensures that "'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988).

More pertinent here, the principle that game-playing litigation behavior should not be rewarded also requires courts to weigh *defendants'* interests in being protected against vexatious litigation. In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), which reached this Court from the lower courts' conflicting decisions with respect to a motion to dismiss, the Court wrote:

> [I]n this type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the

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[7] *E.g.*, 5 WRIGHT & MILLER, *supra*, § 1217, at 258-263 (3d ed. 2004) ("Th[e] reluctance on the part of federal courts to dismiss * * * understandably manifests itself most prominently and most frequently when the plaintiff is appearing pro se. Conversely, the federal courts are far less charitable when one or more amended pleadings already have been filed with no measurable increase in clarity.") (footnote omitted).

> merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial, such a factor is not to be totally dismissed.

421 U.S. at 742-743. In the antitrust context, this Court has advised the district courts to "use the tools available" to curb "class-action harassment" and "windfall settlements." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979). "Certainly in a case of this magnitude," those tools include "the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated General Contractors*, 459 U.S. at 528 n.17.[8]

This Court's *Dura* opinion found it appropriate to observe – as a factor supporting a Rule 12(b)(6) dismissal – that:

> allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would * * * permit a plaintiff "with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence."

544 U.S. at 347 (quoting *Blue Chip Stamps*, 421 U.S. at 741). Notably, the Court made that observation in *Dura* even as it "assume[d], at least for argument's sake, that neither the Rules nor the securities statutes impose any special further re-

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[8] See also *DM Research, Inc.*, 170 F.3d at 55 ("[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome.").

quirement in respect to the pleading of proximate causation or economic loss." 544 U.S. at 346. The Court did not disavow – indeed, it noted with approval (544 U.S. at 346-347) – the "simple test" of *Conley* v. *Gibson* and the "not * * * great burden" of *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. at 513-515. Nonetheless, the Court recognized that concerns about abusive litigation were relevant to its evaluation of the motion to dismiss and, in applying the ordinary standards of Rule 8 and Rule 12(b)(6), held that, where plaintiffs must *prove* particular facts to prevail, they must also "*allege* th[o]se requirements" to survive a motion to dismiss. 544 U.S. at 346. Only then might a plaintiff harbor a "'reasonably founded hope'" that discovery will reveal evidence establishing liability. *Id.* at 347 (quoting *Blue Chip Stamps*, 421 U.S. at 741).

These cases reflect a simple principle. Properly construed and applied, the Federal Rules of Civil Procedure permit – even require – courts to recognize reality: that some complaints warrant closer scrutiny than others, because of the risk and the reality of abusive litigation.

A. Courts Should Recognize The Potential Abuse Of Class Actions When Construing Pleadings

It is no accident that the pleading question presented here arises in the context of a putative class action brought by a law firm that is part of the organized plaintiffs' class-action bar. In cases of this sort, "the lawyers who bring the lawsuits effectively control the litigation * * *. In short, the clients are marginally relevant at best." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5; see also *In re Network Assocs., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (quoting attorney William S. Lerach: "I have the greatest practice in the world because I have no clients. I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do.").

The impetus for cases like this one is not actual suspicion of wrongdoing, and certainly not the expectation that an actual

trial on the merits will yield success, but the hope that the thinnest of allegations, with the greatest of legal consequences, will survive motions to dismiss and begin to put pressure on defendants to settle complex litigation.[9] Judge Friendly – borrowing a term used earlier by antitrust scholar Milton Handler – termed this the "blackmail settlement." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) (citing Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971)).

The Senate Judiciary Committee observed last year:

> Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool and not a mechanism that affects the substantive outcome of a lawsuit. * * * [W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success.
>
> Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions.

S. Rep. No. 109-14, at 20-21 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21.

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[9] See Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999).

Former Attorney General Dick Thornburgh put the matter even more bluntly seven years earlier in testimony before the House Judiciary Committee:

> There is nothing inherently wrong with the general concept of the class action lawsuit or the theory of aggregation of claims. These suits have held an honored place in American law and in British common law for centuries. Adjudication for a class has always been feasible whenever class members have a common legal interest that could not practically be resolved one at a time.
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> * * * * *
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> Relatively recently, however, plaintiffs' lawyers, often styling themselves consumer attorneys, have been allowed to wield class actions as judicial weapons of mass destruction.
>
> These suits promise such devastating consequences that even the most innocent of defendants must settle or risk near total annihilation.
>
> To add insult to these injuries, these plaintiffs' lawyers purport to hold the moral high ground. They act as if they were not mere attorneys, but private sector attorneys general. Yet, they are not bound or constrained in any way by Democratic processes.
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> * * * * *
>
> Far more corrupting to the law, these class actions are often initiated, not by the class members themselves, but by a group of class action lawyers who divide up shares of litigation as if lawsuits were investment properties.

Mass Torts and Class-Action Lawsuits: Oversight Hearings Regarding Mass Torts and Class Action Lawsuits Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, 105th Cong. 29-30 (Mar. 5, 1998) (testimony of former Attorney General Dick Thornburgh),

available at http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.HTM.

The present case is a prime example. It is based on a theory that the structure of an entire industry would have changed dramatically in a few short years, but for antitrust violations. Plaintiffs allege that virtually the entire industry participated in those violations and seek relief on behalf of hundreds of millions of people and businesses. Such a far-reaching lawsuit should not be allowed to proceed after such a toothless review of the complaint's allegations as that undertaken by the court of appeals. "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end." *Maty* v. *Grasselli Chem. Co.*, 303 U.S. 197, 200 (1938). A bare conspiracy allegation should not suffice to erect a barrier to examining the massive scope of plaintiffs' complaint and the inevitable discovery costs it would impose on defendants. Rather – just as the *in terrorem* effect of litigation was highly relevant to the 12(b)(6) inquiry in *Dura* – here it is appropriate to consider that this is a mega-lawsuit in which the purported plaintiff class is hundreds of millions of persons and businesses, and the defendants are practically an entire industry, and in which the defendants could easily incur tens of millions of dollars in discovery costs before having any opportunity to contest the validity of the claim on summary judgment.

B. Courts Should Construe Pleadings In Antitrust Cases In Light Of Substantive Antitrust Doctrine

The nature of the inference on which this case rests – an inference of conspiracy supported only by parallel conduct that is perfectly lawful standing alone – is also highly relevant to the degree of care with which the complaint should be scrutinized. This is not a case like *Swierkiewicz*, in which a court's acceptance of an inference of unlawful behavior permits a claim of discrimination against a single individual to proceed to discovery. Parallel competitive behavior by businesses is endemic in an industrial economy and it is almost always *desirable*

behavior that should be encouraged. Parallel behavior usually reflects nothing more than the fact that all of the firms in an industry operate in the same market environment; they are subject to the same regulatory constraints, purchase the same raw materials, and attempt to sell to the same customers. Parallel behavior is more frequently a hallmark of intense competition than of anticompetitive conspiracy; in highly competitive markets, any competitive strategy that proves to be successful will rapidly attract imitators. "No anticompetitive inference can be drawn from such copying, any more than such an inference can be drawn from the fact that almost all farmers use fertilizer * * *." 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1821e, at 188 (2d ed. 2005).

That is true well beyond the telecommunications industry, the subject of this case. For example, pharmaceutical firms confront (i) pervasive, uniformly applied regulation; (ii) gatekeeper regulators who determine whether and how prescription pharmaceutical products will be used; and (iii) increasingly sophisticated third-party payors who impose similar requirements on all competitors. All of those factors reinforce other market forces that tend to lead to similar reactions by different firms. The cost of permitting vexatious litigation challenging such innocuous yet parallel conduct to proceed is very high. Accordingly, when plaintiffs seek to challenge such conduct as the product of conspiracy based on nothing but a conclusory inference of conspiracy, "a district court must retain the power to insist upon some specificity in pleading before allowing [such] a potentially massive factual controversy to proceed." *Associated Gen. Contractors*, 459 U.S. at 528 n.17.

Even though parallel behavior, standing alone, is very unlikely to manifest an anticompetitive agreement, it would be exceedingly difficult for any business to demonstrate that the parallel behavior *could not possibly* have been the result of an agreement or, as the Second Circuit put it, that "there is no set of facts that would permit a plaintiff to demonstrate that the particular set of parallelism asserted was the product of collu-

sion rather than coincidence." Pet. App. 25a. That task would be especially daunting in the motion-to-dismiss context, where the court's inquiry is largely constrained by the allegations that the *plaintiff* chooses to include in its complaint.

Conley warned against making "one misstep by [plaintiffs'] counsel * * * decisive to the outcome," 355 U.S. at 48, but it is no less true that one clever step by plaintiffs' counsel (such as adding a conclusory "conspiracy" allegation "upon information and belief" to an otherwise facially groundless complaint) should not be enough to force an entire industry to endure massive litigation with no real foundation. If plaintiffs are allowed to inflict large discovery costs on the basis of flawed inferences based on such flimsy allegations, the inevitable result will be a flood of meritless suits, and a very real risk that "mistaken inferences" will "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594; see also *Monsanto*, 465 U.S. at 763 (permitting an inference of conspiracy from conduct that is as consistent with legitimate competition as with conspiracy "could deter or penalize perfectly legitimate conduct").

The Second Circuit believed that it was powerless to consider such factors, or the acknowledged risk that its ruling would encourage abusive litigation. For the reasons given above, that view is mistaken.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

MICHAEL FIELD ALTSCHUL
CTIA – The Wireless Association
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3000

PETER B. KENNEY, JR.
Northwest Airlines, Inc.
Department A1180
2700 Loan Oak Parkway
Eagan, MN 55121-1534
(612) 726-3663

ROY T. ENGLERT, JR.*
Counsel of Record
DONALD J. RUSSELL
MATTHEW R. SEGAL
Robbins, Russell, Englert Orseck & Untereiner LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500

JOHN T. WHATLEY
Alliance of Automobile Manufacturers
1401 H Street, N.W., Suite 900
Washington, D.C. 20005
(202) 326-5500

KEN KHOURY
GUY STEPHENSON
KATHRYN FEWELL
Weyerhaeuser Company
CH 1 J 28
33663 Weyerhaeuser Way
Federal Way, WA 98003
(253) 924-5091

RICKS P. FRAZIER
United Air Lines, Inc.
1200 E. Algonquin Rd.
Elk Grove Township, IL 60007
(847) 700-4466

MARK S. POPOFSKY
Kaye Scholer LLP
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500
Counsel for Pharmaceutical Research and Manufacturers of America

SAUL P MORGENSTERN
ROBERT GRASS
SHEFALI M. KOTHARI
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000
Counsel for Pharmaceutical Research and Manufacturers of America

AUGUST 2006